NO. 47733-5-II
Cowlitz Co. Cause NO. 09-1-00735-4

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRED DURGELOH,

Petitioner.

AMENDED COVER SHEET BRIEF OF RESPONDENT IN RESPONSE TO PERSONAL RESTRAINT PETITION

RYAN JURVAKANINEN
Prosecuting Attorney
TOM LADOUCEUR/ #19963
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I. INTRODUCTION

Fred Durgeloh, hereafter petitioner, has petitioned this Court for release from personal restraint. He asserts that his trial attorney was ineffective for (1) failing to properly investigate and hire a mental health expert before trial; (2) failing to properly cite authority for his sentence recommendation; (3) failing to properly argue same criminal conduct at sentencing; and (4) failing to move to suppress evidence. The petitioner's proposed remedies are to grant him a new trial or remand for a resentencing hearing. As these claims are without merit, the Court should deny the petition.

II. STATEMENT OF THE CASE

Petitioner was charged by amended information with two counts of assault in the second degree, two counts of felony harassment, and unlawful possession of a firearm in the second degree. The State alleged the appellant was armed with a firearm during the commission of the assaults and harassments. CP 23-25.

Petitioner proceeded to jury trial on July 26, 2011. The jury returned guilty verdicts for all charges, as well as four special verdicts finding he was armed with a firearm. The trial court subsequently

sentenced him to a standard range sentence of one hundred twenty months in prison.

Pretrial psychiatric evaluation

Petitioner was evaluated by Dr. Morrison at Western State Hospital on July 27, 2010. His nine page report, dated September 27, 2010, outlined the reason for the referral, nature of the evaluation, relevant clinical history including medical history and mental health history, defendant's version of the alleged offense, and a mental status examination. Dr. Morrison rendered his forensic opinions in his report, which included his opinion that "based on all available data Mr. Durgeloh was capable of forming a mental state of intent and performing purposeful, organized, and goal-directed behaviors at the time of the alleged incident. Whether he did in fact form the requisite mens rea or whether or not he did in fact performed the alleged acts remains a question for the trier of fact."

Petitioner's version of the incident provided as part of the evaluation included the following statements: he remembered the incident, his dog was sleeping beside him and jumped up, he heard yelling and grabbed his gun and yelled that he had a gun. He did not see anyone but individuals identified themselves as sheriffs. He told them to get out of here and leave him alone. When they responded that they just needed to

talk to him to see if he was okay, he said he brandished the gun because he talks with his hands. He went back into the house figuring they would just leave but they yelled some more. They called him on the phone telling him they needed to talk to him to see if he was okay and that they were going to have to take him to the hospital and have him checked out and then bring him home. He denied feeling like he was paranoid and said he was not crazy or suicidal. He denied that he had been threatening but argued with them about being arrested. He maintained that he had a pistol but did not threaten anyone.

Trial testimony

Fred Carl Durgeloh's caregiver alerted the Cowlitz County Sheriff's Office that Durgeloh could be suicidal. Deputies Ryan Cruser and Kimberly Moore drove to Durgeloh's home to check on him, knocked on the rear door, and announced that they were from the sheriff's office, but no one answered. Through a window, Officer Cruser saw Durgeloh armed with a gun; Cruser told him to "put the gun down." 2 Verbatim Report of Proceedings (VRP) at 115. Instead, Durgeloh came out onto the porch; pointed the gun in the officers' direction; told them he had a gun with a bullet in it; held the gun up higher; pulled the hammer back; and said, "See, now it's cocked.... You need to leave." 2 VRP at 165.

Durgeloh returned inside the house, placed a 911 call, and told the dispatcher that the officers were trespassing, to "[g]et them out of here," and, "They will die." 2 VRP at 208. Five minutes later, Durgeloh again called 911 insisting that the officers were trespassing. This time he told the police dispatcher (1) to "[g]et [the officers] out of here"; (2) "If [the officers] walk on my porch, they're going to die"; (RP 210, 211) and (3) to "[t]ell [the officers] to respect their lives" and that "when they walk through the front door, my back porch door, that yes, I do have a loaded .45 and that yes, I'm going to hold it at them." 2 VRP at 212. The officers overheard Durgeloh making these statements to the 911 dispatcher and, after observing Durgeloh point the gun in their direction, requested backup units.

A Special Weapons And Tactics (SWAT) team arrived. Eventually, police negotiators talked Durgeloh out of his home, unarmed; and the deputies placed him under arrest. Moore obtained a warrant to search the residence. During the search, SWAT officers found "a box of .45 shells that had a few rounds missing from it" and a .45 caliber Ruger semiautomatic handgun in Durgeloh's bed. Clerk's Papers (CP) at 2.[1]

[1] The above recitation of facts was taken from the appellate court opinion in State v. Durgeloh, 180 Wash. App. 1023 (2014).

Petitioner gave basically the same account when he testified at the trial in July of 2011 as he gave to Dr. Morrison who performed the psychiatric evaluation in 2010. He remembered that his dog suddenly went wild and he got up into his wheelchair and went to the back door. He didn't see anybody but heard yelling. He armed himself with a .45 Ruger and went to the back door. RP 240. He heard yelling and that "they're the Sheriff." RP 240. He said he was moving his arms in a manner that looked like he was pointing his pistol at somebody but he was trying to get out the door. RP 241. He "kind of remembered hearing something to the effect of drop your gun, drop your firearm, "but didn't see peace officers or their cars. RP 241. Asked about his mood, defendant said he was confused, underneath a lot of pain, and didn't want to be bothered. RP 242. When asked if he pointed his gun at anybody, defendant said he never pointed the gun at nobody. RP 242. Defendant acknowledged that it could have looked like he was waving his gun around but he was actually just trying to get back in the house in his wheelchair. 242. When asked if he waved the gun around while on the back porch, he first said "I can't believe I did," but then acknowledged it was possible he could have. He denied specifically pointing the gun at anybody intending to do any harm to them. RP 243. He felt that the police were bothering and harassing him and he didn't want them there. RP 245. Defendant further testified that he "wanted

these people to know he had a gun." RP 246. Defendant testified what his thought process was – by having a gun, they wouldn't mess with him and would go away and leave him alone. He recalled that it was very warm that night, he wore gym trunks and a T-shirt, and was listening to loud country-western music. RP 247. A 911 tape was played in which defendant said that he was mad because the police were at his residence. RP 252. Defendant testified he tried to scare the police off and get them to leave, and wanted them to know that they weren't wanted and he had a gun and needed to leave. RP 253.

Post-trial motion and sentencing

On September 15, 2011, petitioner's attorney moved to continue the sentencing and sought an order authorizing an evaluation for "competency or capacity for sentencing." RP 369. He explained that when he tried to talk with petitioner he falls asleep a lot and he thought he was very disoriented.

Dr. Larson then evaluated petitioner in December of 2011. As part of the evaluation, petitioner provided information about the incident, saying Sandra (the caregiver) was concerned and called 911 around 11:30 or 12. The police arrived and he was told to exit the house, but did not disarm himself. He went back in the house and said there was a SWAT

team out there. He said he couldn't go out with a 45 caliber pistol in his hand. They were yelling at him. He walked in and out of the house. He wasn't sure whether the police called Sandra who perhaps called him. He was finally convinced to surrender with the promise that he would be taken to the hospital and then he would be returned home. He was apologetic for his behavior accepted responsibility for his actions, and did not intend to harm anyone. CP 60, pages 5.

The status of the case was next reviewed on January 6, 2012. At that time petitioner's counsel informed the court that "Dr. Larson believes that my client is capable to proceed at this point in time. So competency is not an issue from our standpoint." RP 376. He commented further that petitioner has his ups and downs, and his cognitive abilities go along with that, and he was doing better at that point (the review hearing) than he was a month and a half ago. RP 376, 377. The court found that petitioner was competent and set the matter over for a sentencing hearing on January 27. RP 378. The January 27 sentencing hearing was again postponed because petitioner, according to his counsel, had been admitted into a nursing home that morning. RP 380.

A sentencing hearing was held on March 2, 2012. Petitioner's counsel recommended an exceptional sentence downward of one year of

house arrest, relying upon Dr. Larson's letter. RP 383. The record is clear that Petitioner's attorney asked for an exceptional sentence downward but did not refer to the specific statute.

III. ARGUMENT

I. Petitioner's attorney was not ineffective for failing to obtain yet a second psychiatric evaluation prior to trial when the first evaluation concluded that petitioner's capacity to form the requisite intent was not diminished.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Courts engage in a strong presumption counsel's representation was effective. *State v. Brett,* 126 Wash.2d 136, 198, 892 P.2d 29 (1995); (citing *State v. Thomas,* 109 Wash.2d at 226, 743 P.2d 816.) The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *State v. McFarland*, 127

Wash. 2d 322, 335, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995).

Relief by way of a collateral challenge to a judgment and sentence is extraordinary. *In re Pers. Restraint of Coats,* 173 Wash.2d 123, 132, 267 P.3d 324 (2011). A personal restraint petition filed within one year after the judgment and sentence is final generally may challenge the conviction on any grounds, but must meet a high standard. *Id.* The petitioner must show with a preponderance of the evidence that he or she was actually and substantially prejudiced by a violation of constitutional rights, or that his or her trial suffered from a nonconstitutional defect that inherently resulted in a complete miscarriage of justice. *Id; In re Pers. Restraint of Brett,* 142 Wash.2d 868, 874, 16 P.3d 601 (2001). *In re Copland*, 176 Wash. App. 432, 437, 309 P.3d 626, 629 (2013) review denied, 182 Wash. 2d 1009, 343 P.3d 760 (2015).

Petitioner makes a number of criticisms of the first psychiatric evaluation, including that it was prepared by *Mr.* Morrison, to be distinguished from *Dr.* Larson. Petitioner's brief, page 12. Dr. Morrison has been board certified in psychiatry since 1992. (See Appendix 1 – curriculum vitae of Dr. Morrison) Petitioner claims that Dr. Larson conducted a *more thorough investigation* into "relevant witnesses, rather

than just relying upon" petitioner's self-reporting. Yet both evaluations necessarily relied upon a great deal of historical information provided by petitioner himself. And, both evaluations took into account information provided by Sandra Uden, petitioner's caregiver. Dr. Larson's report does not indicate that he spoke with anybody other than petitioner and Uden. Petitioner goes on to assert, basically, that had his trial lawyer consulted with Dr. Larson before trial he may have been able to mount a diminished capacity defense.

This is a similar argument to that made in *State v. Harper*, 64 Wash. App. 283, 823 P.2d 1137, 1141-42 (1992). In *Harper*, like the case at bar, defendant filed a personal restraint petition arguing his trial counsel was ineffective for failing to obtain an expert opinion supporting diminished capacity, where after the trial his appellate counsel unearthed an expert supporting that defense. The court rejected the ineffective assistance claim, noting that *Harper*, like petitioner here, had been evaluated by a qualified expert who concluded he did not meet the standards for a diminished capacity defense. The court wrote, "In effect, Harper's argument is that trial counsel's performance was deficient because he did not continue seeking out expert opinions until he found an expert who was willing to opine that Harper did meet the diminished capacity standards. However, he makes this argument with the post hoc

knowledge that such an expert existed, but was not consulted until after the trial. We disagree that counsel's failure to consult additional experts fell below the objective standard of reasonableness." *Harper,* at 290. This is exactly what we have in the case at bar.

Petitioner mischaracterizes his trial counsel's action as a "decision to abandon the diminished capacity defense," and argues from this false premise that this "constitutes both deficient performance and unreasonable *[sic]* under Strickland." (petitioner's brief, page 24). Just as in *Harper*, after petitioner underwent a psychiatric evaluation, his counsel simply did not have an expert who could give an opinion supporting a diminished capacity defense.[2] And, as *Harper* makes clear, petitioner's attorney was under no duty to try to ferret out experts in hopes that he would find one willing to give a favorable opinion on diminished capacity. Rather, given the information the attorney possessed he pursued a general denial, which petitioner's trial testimony and prior statements to Dr. Morrison supported – that *he did not intend* to put anyone in fear and apprehension of causing them harm, not that *he was incapable of forming* the requisite intent

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[2] "Given the information known to Harper's counsel at the time of trial, this was the only defense available to Harper because Dr. Marra had opined that Harper did not satisfy the standards for a diminished capacity defense. Defense counsel's conduct did not fall below the objective standard of reasonableness." *Harper,* at 290.

because of a mental disorder.[3] Given petitioner's statements to Dr. Morrison and his testimony at trial this was a completely reasonable course of action.

Petitioner asserts his "counsel's decision to wait until after trial to request for a diminished capacity instruction was unquestionably unreasonable." (Petitioner's brief, page 28). Again, petitioner mischaracterizes what occurred. His attorney did not *wait* until after trial to request a diminished capacity instruction. Rather, on September 15, 2011, he described petitioner's cognitive abilities as having ups and downs, as evidenced by him falling asleep and being disoriented, so he wanted a competency/capacity evaluation prior to sentencing. Given these observations, the fact that he sought another evaluation before sentencing, does not mean that he *inexplicably waited to have him evaluated*, as petitioner asserts. Petitioner was psychiatrically evaluated before the trial, but since his attorney noticed that he had "ups and downs" he evidently felt it was prudent to obtain another evaluation before going forward with the sentencing hearing. It is noteworthy that the request for a pre-

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[3] "Diminished capacity" is a mental condition not amounting to insanity which prevents defendant from possessing requisite mental state necessary to commit crime charged. *State v. Warden*, (1997) 133 Wash.2d 559, 947 P.2d 708.

sentencing evaluation occurred over a year after the pretrial psychiatric evaluation.

Petitioner asserts in a conclusory fashion that his counsel did not properly investigate his mental health issues. He makes this assertion despite recognizing that his counsel's entire investigation is not part of the record and it only "appears" that he did not do a number of things like gather evidence from other sources, gather medical records, interview potential witnesses, and research the relevant law. (Petitioner's brief page 31-32). Petitioner's argument really boils down to a mischaracterization that because his counsel requested a second psychiatric evaluation before sentencing he "only apparently thought of" a mental health defense after trial, and therefore acted unreasonably and ineffectively. This argument fails because petitioner's attorney did consider diminished capacity but based upon what he knew after a pretrial psychiatric evaluation the defense was unsupported. The fact that a different expert, who evaluated petitioner over a year after the first evaluation, held a different opinion does not make petitioner's counsel ineffective because failing to consult with additional experts does not fall below an objective standard of reasonableness.

II. Petitioner's attorney was not ineffective for failing to cite to the specific statutory authority in support of his request for an exceptional sentence downward.

Petitioner's attorney argued for an exceptional sentence downward based upon the psychiatric evaluation of Dr. Larson. The attorney did not inform the court specifically that RCW 9.94A.535 (1) (e) was the statutory basis for his request for an exceptional sentence downward. Under the circumstances of this case, the failure to do so did not prejudice him.

Petitioner likens this case to *State v. McGill*, 112 Wash. App. 95, 98-99, 47 P.3d 173, 175 (2002), asserting that "as in McGill, the sentencing court erroneously believed that it had no legal basis to impose an exceptional sentence, despite controlling law to the contrary." (Petitioner's brief, page 39).

State v. McGill is distinguishable. There, the trial court stated at sentencing,"*I'm sure you are aware that the legislature has decided that judges should not have discretion beyond a certain sentencing range on these matters.* And sometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn't seem to be justified. But it's not my call to determine the standard range. The legislature has done that for me. *So I have no option but to sentence you within the range on these of 87 months to 116*

months. But I do get to decide where in that range the sentence is appropriate." State v. McGill, at 98-99. The appellate court remanded for resentencing because the trial court erroneously believed it lacked authority to impose an exceptional sentence.

Unlike *McGill*, at no point during the sentencing hearing in the case at bar did the trial court express an erroneous belief that there was no legal basis to impose the requested exceptional sentence. Rather, the court simply chose not to impose the exceptional sentence that petitioner's attorney recommended. Where a defendant has requested an exceptional sentence below the standard range review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; *i.e.,* it takes the position that it will never impose a sentence below the standard range. *State v. Garcia-Martinez*, 88 Wash. App. 322, 330, 944 P.2d 1104, 1109 (1997).

In the case at bar, petitioner's attorney was not ineffective simply for failing to provide the court with the specific statute that related to his sentence recommendation. The trial court expressed neither confusion nor

an erroneous belief about its authority to impose an exceptional sentence. Consequently this court should not remand the case for resentencing.

III. Petitioner's attorney was not ineffective for failing to "meaningfully" argue that petitioner's convictions were the same criminal conduct.

Petitioner's convictions for assault and harassment were not the same criminal conduct, so his attorney was not ineffective for failing to make what he considers to be a "meaningful" argument that they were.

Deputy Moore testified that petitioner came out on the porch holding a handgun, waving it back and forth, putting a round into the chamber, and telling her and Sgt. Cruser that he had put a round into the chamber. RP 119. Petitioner pointed the gun in the direction that they were standing. RP 120. There was some more yelling back and forth between petitioner and the deputies. This occurred while petitioner was outside on the porch and lasted for about five minutes. Petitioner then went back inside his residence for a brief time. RP 121-124. When he came back out, petitioner again pointed the gun in their direction. Meanwhile, backup units were called and it took them less than 10 min. to arrive. RP 125. While inside his trailer, Moore heard petitioner on the phone with dispatch saying again "they will die." RP 128. The ensuing standoff with the SWAT team took 2 to 3 hours before petitioner was eventually arrested.

Sgt. Cruser testified that he was thinking petitioner was serious and that they were in danger during the incident. RP 170.

On the charges of assault in the second degree the state had to prove defendant assaulted Kimberly Moore and Ryan Cruser with a deadly weapon. Those crimes were completed at the point in time when petitioner pointed a firearm at the victims. On the charges of felony harassment, on the other hand, the state had to prove petitioner knowingly threatened to cause bodily injury to the victims, immediately *or in the future*. The facts of this case were that after petitioner pointed the gun at the victims, he continued to make statements about an intent to kill them which could have, in context, occurred immediately or *at some point in the future*, i.e. during the course of a standoff that lasted several hours. Consequently, the charges of assault 2 and felony harassment did not occur at the same time, defeating the claim that they were the same criminal conduct.

Petitioner's attorney did raise the issue, albeit framed in the context of whether the charges merged, and the trial court properly ruled that the offenses were not the same criminal conduct based upon the facts heard at trial. RP 398-401.

IV. Petitioner's attorney was not ineffective for failing to investigate what petitioner mistakenly believes is a potentially meritorious motion to suppress.

Petitioner offers the court no more than an assumption as to how his attorney investigated the case including conducting interviews, specifically of Deputy Moore. From these assumptions and excerpts from a probable cause statement petitioner apparently concludes that had his attorney made a motion to suppress it would have been granted, and therefore he was prejudiced by his counsel's ineffective assistance.

The flaw in this argument is that there is no showing whatsoever that there were any grounds to make a suppression motion, much less that had a motion been made it would have been granted. Deputy Moore testified that after petitioner was arrested she applied for a search warrant to search the residence and a search was conducted pursuant to the warrant. RP 130. Her probable cause statement which petitioner refers to in part, CP 2, plainly states that the .45 caliber handgun and a partial box of .45 caliber rounds were seized pursuant to a search warrant. Petitioner asserts that the probable cause statement is "noticeably vague about exactly when the firearm has [*sic*] taken from the home." (Petitioner's brief, footnote 173, page 48.) Respondent asserts there was nothing vague about how the police reports described finding and seizing the firearm – it was discovered and seized pursuant to a search warrant. Nothing in the record supports the supposition that there were any grounds to challenge

the search. Petitioner has failed to show that his attorney performed deficiently and how he could have possibly been prejudiced.

IV. CONCLUSION

Based on the preceding argument, respondent requests the Court deny the petition.

Respectfully submitted this 16 day of November, 2015.

By: _____
TOM LADOUCEUR, WSBA #19963
CHIEF CRIMINAL DEPUTY
PROSECUTING ATTORNEY

APPENDIX 1

Glenn Morrison, DO
Forensic Psychiatrist

Home Address:
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Tacoma, WA 98407

Office Address:
Center for Forensic Services
Western State Hospital
9601 Steilacoom Blvd SW
Tacoma, WA 98498
Office (253) 756-2813

Cell (253) 370-5307
Home email: glenn.morrison@gmail.com
Pager (253) 291-0830

N.B. Please use my home address, home email, and private cell phone number above for any correspondence pertaining to outside employment opportunities; thank you. It would be inappropriate for me to correspond via Western State Hospital regarding non-State-related employment.

Education:

Medical School:
Philadelphia College of Osteopathic Medicine
Philadelphia, PA
Degree: DO
Dates Attended: August 1983- June 1987

Undergraduate:
Duke University
Durham, NC
Degree: B.A.
Dates Attended: September 1977- May 1981

Training:

Internship in Psychiatry
Loma Linda University Medical Center
Loma Linda , CA
July 1987 - June 1988

Residency in Psychiatry
Medical College of Virginia
Richmond, VA
July 1988 - June 1991

Employment:

Ward Psychiatrist, Western State Hospital Adult Psychiatric Unit Admissions (Acute care 30 bed psychiatric ward with responsibilities as team leader for assessment, treatment and discharge planning as well as civil detention and court testimony) August 1991-July 2000.

Forensic Psychiatrist Western State Hospital Ward F-7 (A 30 bed woman's ward with competency evaluation and restoration patients as well as NGRI patients) August 2000-August 2001

Forensic Psychiatrist , Center for Forensic Services (Acute inpatient care, competency evaluation and restoration, in-custody and outpatient evaluation, refractory case management)

Committees Served on at Western State Hospital:

Bioethics Committee

Human Research Committee

Impaired Physician's Resource Committee

Medical Records Committee

Sexual Practices Committee

Board Certification:

Psychiatry, American Board of Psychiatry and Neurology, Part I, 1992; Part II, 1993

Additional Activities:

Union of Physicians of Washington (a small, non-profit union representing physicians employed at either Western State Hospital or Eastern State Hospital)
Board Member 2005- present
Union Vice President, 2009 – present

Personal Information:

U.S. Citizen, born Philadelphia, Pennsylvania 5/8/59
One daughter (age 11)

References:

Available upon request

AMENDED CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 20th, 2015.

Michelle Sasser
Michelle Sasser